No. 11,457

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ALVA ALEKSICH, as Administrator of the Estate of Jakor Aleksich,

Appellant,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation,

Appellee.

REPLY BRIEF

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The word "respectively" in the insuring clause means "one of two," i. e., that the Insurance Company will pay either for loss by sickness or loss by accident, but not for both coincidently. English cannot be stretched to make it embrace anything else in that context.

Summarizing appellee's argument.

We submit, that it contends that the Court must first insert in the insuring clause, after "accidental means," the words "subject, however, to all the provisions and limitations hereinafter contained"; then the Court must insert in the caption, after the words "accidental means," the words "as herein provided"; then the Court must strike out of the caption "Perfect Income Policy"; then the Court must insert in the endorsement after "Accidental Means," the words "as herein provided"; then the Court must put a comma after "sickness" in the caption, and also in the endorsement; then the Court must decide (without plea of mistake or lack of authority of the agent)

to strike the rider "Your policy with us is the best insurance you can buy"; then if "respectively" had any such dragnet meaning claimed by counsel, it should be inserted in the caption and also the endorsement.

Then the Court must make another amendment. The words "loss of time" (due to disability perhaps) *do not occur in Part B.* But "partial loss of time" does occur in Part C. (Really it might be worth all the plaintiff claims for defendant to learn that under Part B, unless there is inserted "during such disability" after "thereafter," the defendant agrees to pay for 24 months though the total disability may exist only for one day.)

A shocking provision is found in the closing words of Part A.

"Only one of the amounts named will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity," i. e., payment of $100 for loss of one finger absolves from payment of $1,000 for loss of sight, if both happened in the same accident.

We allude to these features to dispel a frequent judicial approach that these contracts are carefully drawn in an effort to be fair to the purchaser. The writer was at first sight, so deluded about this one.

The defendant would constrict the meaning of the word "thing" as found in the Montana Statute about open policies, to concrete movables. No other noun has such varied meanings.

"Thing: That which may become an object of thought, whether material or ideal, animate or inanimate, actual, possible, or imaginary." Century Dictionary.

It would be correct English to say "To use the mails to defraud is not a proper thing to do," or that to sell a

man a sow's ear pretending that it is a silk purse for his beneficiary is a nasty thing to do, or "Honesty is the best policy is a thing to consider even when formulating an insurance policy." "Earning capacity is a valuable thing."

The Erie decision did not hold that Lewis-Sutherland on Statutory Construction should prevail over a decision of the highest court of the State by the law of which the contract is to be interpreted. We quote:

> "Under the familiar rule of construction, known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses are to be applied to the phrase immediately preceding, and are not to be construed as extending to, or including others more remote. (State v. Centennial Brewing Company, 55 Mont. 500; 178 Pac. 296). The rule is applicable to the construction of deeds, as well as statutes."

Cobban Realty Co. v. Chicago, etc., Ry. Co., 58 Mont. 188; 190 Pac. 988. This case was cited in original brief of appellant. It is not criticised by appellee. On this question appellee cites three decisions, p. 6.

(1) Dick v. King, 73 Mont. 456; 236 Pac. 1093. The opinion does not mention the rule of the last antecedent. It has language apt to consider in this case.

> "It may be that the contract * * * impose a hardship upon the defendant, but he was sui juris when he signed those instruments, and it is one of the privileges of every man to make unwise contracts, and many avail themselves of the privilege."

(2) Also cited, Brown v. Homestake Ex. Co., 98 Mont. 305; 39 Pac. (2nd) 168. The opinion does not mention the rule of the last antecedent, but we hope the

Court will observe in it some language apt to this case about the difficulty of ascertainment of damages being no bar to recovery.

(3) Ulmen v. National Surety Co., 3 Fed. Supp. 348, D. C. Mont. We suspect this case was not examined *before cited* in appellees' brief.

On page 6 appellee cites seemingly for a definition of "respectively."

Martien v. Porter, 68 Mont. 450; 219 Pac. 817.

The Court speaks of "counsel for the *respective* parties." In so doing, it conveys rather our meaning of the word "respectively" than the appellee's, i. e., either pay for accident or sickness,—not both coincidently. There is nothing else about the meaning of "respectively." We hope the Court will observe the fine quotation from Marshall, C. J. about dictum in this opinion on p. 468 of official volume.

As the Court may suspect from the opinion in Aleksich v. Mutual Benefit Health and Accident Association, Mont., 164 Pac. (2nd) 372, we have read an able brief of appellee claiming that because benefits *for death* were not mentioned *in the insuring clause*, none were payable, though elsewhere (11 p. 3) is found "Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured." Now we face an able brief arguing that the defendant should escape liability for "loss of time" due to accident *which is in the insuring clause.* When the joint hunt ended, the white man said to the Indian "Either you take the crow and I the grouse, or I'll take the grouse and you the crow."

In reply to the dismay expressed on page 7 that the legal logical local construction of the insuring clause would lead to impairment of the Accident Indemnities, we suggest another method of detecting fallacy of the argument about death's canceling liability for loss of time and the same fallacy in the Court's conclusion quoted on p. 11. In the same place in the insuring clause, the defendant insures against "loss of limb, sight or time." The insured, by accident, loses both feet. He dies the next week or next hour. Is defendant absolved by his death from payment for loss of feet? If the entire sight of both eyes is destroyed in a blast, would recovery be denied for loss of sight because in leaving the scene blinded for all time, he fell to his death in a winze?

Payments for loss of sight and feet are, indeed, scheduled. But even if this contract were not controlled by the Montana doctrine, "Loss of time" is not mentioned in Part B. The appellant stresses the amount of the premium as pertinent to the interpretation of the contract. Aleksich did not take part in computing reasonable prices for specific hazards.

The apologies of appellant for the wording of the caption and endorsement are not sustained by reference to decisions. No definition of a perfect income policy is vouchsafed. It is true that the only idea I could form of a perfect income policy when drawing the complaint is as described in the complaint.

We assert that no decision of any other court but that of Montana may be given any consideration if in conflict with our peculiar statute of survival, or with our decisions construing the same, or with our measures of

damages, or with our doctrine of the last antecedent. In the Erie case, the law of Pennsylvania, which the Supreme Court felt constrained to follow, was certainly against the weight of authority.

Counsel declined to agree that the statute of survival has not been repealed. It is still in effect, and as follows:

> "9086. ACTION WHEN NOT TO ABATE BY DEATH, MARRIAGE, OR OTHER DISABILITY—PROCEEDINGS IN SUCH CASE. An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall in all cases where a cause of action or defense arose in favor of such party prior to his death or other disability or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."
>
> Sec. 9086, R. C. M., 1935.

Appellee insinuated that the decisions of Montana while applicable to torts are not applicable to liabilities created by contract. No reason is advanced. They apply in actions against railroads for injury under the safety appliance acts where the railroad is an insurer. For negligent injury by a common carrier of passengers, suit may be either for breach of contract, or in tort. The Montana

rules about damages would apply equally on either kind of action. The English language means the same in both classes of action.

If the prime judicial motive for the Hiatt decision is to continue fruitful as there embodied, this Court faces the new problem of defining what is a Perfect Income Policy. Counsel may guess right as to the knowledge of Aleksich about punctuation, though when a contract is integrated, its legal effect controls both parties. But had Aleksich no thought about a perfect income policy? So far we have found no decision defining such a policy. The Montana Supreme Court made no mention of it. The appellee has not commented on our requisites of this new kind of policy now being sold by the defendant.

Courts have refused to define fraud for fear some clever person would evade the definition and yet commit fraud.

We cannot find a definition of the "best insurance that can be bought."

None of the cases cited by appellee tell us of the nature of either of these new policies. A lack of precedent does not seem to us to justify refusal of a court to construe a contract though entirely new to the business if the words are plain English.

The placing of such representations in the most serious contracts most men make in their lives, if there is no intent to live up to them has only novelty to commend it. And the "admonitory finger" only, would encourage rather than thwart such practices so prevalent in the spirit of commercialism.

Not an authority cited by appellant is criticised by appellee or the effect we assigned it disputed. They are

not on generalizations. Every one is directly decisive of the point stated.

Finally, counsel impugn the motives of appellant's counsel. Ours are the same as theirs,—to win for the client This tack (not tact) is in fashion perhaps before juries in criminal cases by the counsel for a defendant when his client is in a net of proof and law—but in 50 years since my first case before the Supreme Court of Montana, this is the first time I have met it in a Court of Appeals.

Policies differ much from each other. Each is somewhat a law unto itself. And now the Federal Courts are not permitted to follow general law only, a much easier task than determining what is the law of a particular state,—where sometimes not a member of the Court of Appeals has practiced his profession.

Four decisions are cited on p. 11 of appellee's brief. In not a one was an open policy before the Court. None had to pass on a "perfect income" policy (of itself necessarily an open policy). No Judge of those cases knew of our statute of survival, or of doctrine entrenched in Montana law, that a representative of a decedent may recover for destroyed earning capacity of an expectancy, though the subject die the same day of its destruction. No decision of any other state can aid much in deciding what is the law of Montana. The Court may feel some confidence in finding in appellee's brief no attack on any decision of Montana that we cite.

The judgment should be reversed.

Respectfully submitted,
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